IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO et al.,
Petitioners,
vs.
THE CHICAGO TITLE & TRUST COMPANY, Trustee of Alexander Rodgers, Bankrupt, et al.,
Respondents.

Certiorari to Circuit Court of Appeals for the Seventh Circuit.

STATEMENT.

This cause originated in the District Court at Chicago, and presents questions under the bankrupt act.

Alexander Rodgers, for some years prior to being adjudged a bankrupt on May 8, 1901, was a wholesale dealer in seeds in Chicago, and in such business occupied under lease a portion of a large six-story and basement building in the City of Chicago.

The National Storage Company is an Illinois corporation engaged in warehousing. It has no single or central warehouse, in which it stores together the property of its different customers. Its business is carried

on by taking a lease of a portion or all of the premises occupied by a customer, fixing its name on the premises, or posting notices thereon, and issuing receipts on property stored therein, as hereinafter shown, this method of warehousing being the same as is involved in case No. 424 upon the present docket of this court.

On the 31st of August, 1900, Rodgers applied to this storage company for storage facilities, and executed to it a written lease of portions of certain floors of his premises. (Rec., 131.) Upon these leased premises the seed in controversy was placed, and signs indicating the storage company's control of the premises as a warehouseman, were posted up and maintained, and upon the written application of Rodgers, the storage company issued to him warehouse receipts, of which the following is a sample (Rec., 136):

"Warrant No. 8401. Lot. No. 1

The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in Div. B, Sec. 1, fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

It is agreed that this Company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable, while in storage, and that this Company shall, in the custody of the above property, be the agent of the holder of this warrant.

Storage and charges as per contract on file with this company. Chicago, August 31, 1900.

(Signed) NATIONAL STORAGE COMPANY,
C. B. BOUTON, *President.*"

Thereupon Rodgers endorsed and hypothecated some of these receipts to the petitioner, The First National Bank of Chicago, to secure loans amounting to $12,000, and others of said receipts to petitioners, H. W. Rogers & Brother, to secure a loan of $5,000.

This proceeding originated by the filing, in the District Court, by the receiver in bankruptcy of a petition, entitled in said court and "In the matter of Alexander Rodgers, Bankrupt, In Bankruptcy." It recites (Rec., 5) that the receiver "*has taken possession of*" certain seed, for which there was then an active market, and that it would be of great advantage to the estate and its creditors to have it sold immediately, and prayed the direction of the court, and that, if the sale was made, any liens thereon be transferred to the proceeds. The petition also recites a notice to these petitioners and others of the presentation of such petition to the court on a certain date. (Rec., 5, 6.)

Thereupon each of these petitioners filed a pleading (Rec., 8-15), reciting an appearance *solely for the purpose of denying the jurisdiction* of the District Court and averring that said seed was not, and never had been, in the possession of said receiver, but was, at the time of, and prior to, the bankruptcy proceedings, in the possession of the National Storage Company, which had issued warehouse receipts therefor, which had been severally endorsed by way of pledge to, and were held by, these petitioners respectively. Each pleading asked that the receiver's petition be dismissed for want of jurisdiction. A similar pleading was filed by the National Storage Company. (Rec., 16 to 20.)

Thereupon the proceeding was, by the court, referred

to one of the regular referees in bankruptcy, who, on the 5th of August, 1901, filed an elaborate report (Rec., 29-45), setting out the transactions which had resulted in the disputed claims of possession, and that "the bankrupt was not, at the date of the filing of his petition in bankruptcy in this case, or at the date of the adjudication of bankruptcy, in possession" of said seed; and recommending that the proceeding be dismissed for want of jurisdiction.

The District Court on August 5th, 1901, entered an order finding that the receiver "received and took possession from the bankrupt peaceably the property in question, * * * and that the Court had jurisdiction and possession of the said property in this cause," and sustaining the exceptions to the referee's report as to possession and jurisdiction of the court. Thereupon, on the agreement of the petitioner, First National Bank, to sell the seed and hold the proceeds "subject to the further order of the Court herein," it was ordered that it proceed at once to sell such seed, and report thereon to the court, and the court reserved the rest of said report for further consideration. (Rec., 55-56.)

The First National Bank having sold the seed for $15,773.41, these petitioners and the National Storage Company filed separate petitions re-asserting their respective rights in said seed, and asking for the payment of the claims, for which it was pledged, out of these proceeds, the petition of the National Storage Company, also asking the payment to it of its warehouse charges. (Rec., 67, 80, 100.)

On motion of the Trustee, these petitions and answers were consolidated, and the case was referred

back to the same referee to take additional proofs. (Rec., 109.)

The cause then coming on for hearing in the District Court, upon the original report of the referee and exceptions thereto, and the subsequent evidence, an order or decree was entered (Rec., pp. 114-116) confirming the referee's first report, "except in so far as the same finds a lack of jurisdiction in this Court, which jurisdiction is hereby sustained." This decree also finds that "the receiver in this case had *not*, at the time of the filing of its petition herein, * * * the right of possession" to the seed in controversy, but that "the National Storage Company was at the said date, and also at the time of the filing of the petition in bankruptcy herein, entitled to possession, and had possession of said property." The decree then orders the money paid to these petitioners respectively except a few dollars paid to the National Storage Company for its storage charges. In other words, the court receded from its prior decision as to possession, but re-asserted its jurisdiction of the case.

From this order or decree the respondents perfected an *appeal* to the Circuit Court of Appeals, and that court, treating the appeal as conferring on it jurisdiction to review and revise the questions of fact resolved by the referee and the District Court in favor of these petitioners, decided that no adequate possession had been taken and maintained by the storage company; that the transactions resulting in the issuance of warehouse receipts were fraudulent and voidable by the trustee, and that, if an equitable lien arose under the

Illinois law, it did not prevail against the title of the trustee who, in this respect, stood in the same position as an attaching creditor. (See opinion, Rec., pp. 377, 392; also reported in 125 Fed., 169.)

Thereupon these petitioners were granted this writ of certiorari.

BRIEF OF ARGUMENT.

I.

THIS CASE IN THE DISTRICT COURT WAS A PROCEEDING IN BANKRUPTCY.

What is the scope of the inquiry presented by this record to this court?

This depends upon the question, to what extent, if any, the Circuit Court of Appeals had power to review the order of the District Court.

The question of the jurisdiction of the Circuit Court of Appeals in turn depends upon the character of the proceeding in the District Court. If, under the distinction pointed out in *Bardes* v. *Hawarden Bank*, 178 U. S., 524, this was, in the District Court, a proceeding in bankruptcy, and not an independent suit, no *appeal* lay to the Circuit Court of Appeals, and that court, if it could review the case at all, could only do so by treating it as a petition for review, in which event its right to review was confined by the statute to questions of law.

What, then, was the character of the proceeding in the bankruptcy court?

In form it was a proceeding in bankruptcy, and was so regarded by those who instituted it. The initial petition is entitled in the bankruptcy court. It is a petition of a receiver in bankruptcy for directions of the court respecting a sale of property alleged by such receiver to be in *his possession*. While it contained no direct

prayer for any adjudication of rights, it asked that, if there were any liens, they should be transferred to the proceeds—which necessarily involved an adjudication upon the validity and existence of liens.

Bardes v. *Hawarden Bank,* 178 U. S., 524, and subsequent cases, hold that the present statute retains the distinction, existing under the prior bankrupt law, between a *proceeding in bankruptcy* "initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt," and an *independent suit* to determine a controversy between the trustee in bankruptcy and a claimant of an adverse interest. Hence, the decisions under the earlier act, as to what constitutes an independent suit, are in point under the present act.

Under the law of 1867 the bankruptcy court was *without jurisdiction* to decide upon adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings—petition and rule to show cause, or notice—whether such claim was to the absolute title of the property, or only to a lien thereon. In

Smith v. *Mason,* 14 Wall., 419,

an assignee in bankruptcy filed a petition in the bankruptcy court against a third person, in the possession of a fund and claiming it adversely, asking that it be awarded to the assignee. In answer to an order to show cause the claimant set up that "the court had no jurisdiction to proceed against him in that mode," and this court so held, saying:

"Special provision is made for the revision in the Circuit Court of controversies like the one exhibited in this record, and the court is of the opinion that such causes cannot be commenced by a petition for a rule to show cause, as in this case, nor be determined in a summary way by the District Court sitting in bankruptcy, without due process of law. * * *

Suffice it to say, without expressing any opinion as to the weight of the evidence, the appellant claimed the fund as his own property, and if his claim is just and legal, the possession of the depositary was his possession, and if the assignee in bankruptcy would divest him of the possession and control of the fund he must do it by a suit at law or in equity, as provided in the third clause of the second section of the Bankrupt Act."

Marshall v. *Knox,* 16 Wall., 551,

a like summary proceeding, where this court extended this rule to adverse claimants of liens only. In that case the goods were in the custody of the sheriff, under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the bankruptcy of the tenant.

This court said:

"The court is of the opinion, therefore, that the District Court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule to show cause, to deliver up possession of the goods in question to the assignees."

Other cases illustrative of the application of this rule under the law of 1867, are:

Knight v. *Cheney,* 5 N. B. R., 305; Fed. Cas., No. 7883,

a case involving the right of the bankruptcy court to order, in a summary way, a sale of property claimed by the assignee in bankruptcy, but in the actual pos-

session of a third person claiming it as owner. Mr. Justice Clifford said:

"Discretionary power, it must be conceded, exists in the district court to order a sale of the estate of the debtor, where it appears that the title is in dispute, if it also appears that the debtor was in possession of the estate at the time that he was adjudged bankrupt, and that the estate was duly transferred to the assignee and that it remained in his possession at the time the sale was ordered. * * *

Viewed in any light, the court is of the opinion that the district court does not possess the power under that provision to order in a summary way the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some other former owner."

And upon a *petition for revision* the action of the District Court was reversed.

In re Marter, 12 N. B. R., 185; Fed. Cas., No. 9143,

where, upon a summary petition, a third person had been enjoined from disposing of the property of the bankrupt in his possession, and had violated the injunction, and a motion for an attachment for contempt was denied by Mr. Justice Brown upon the ground that the District Court was without power to determine the validity of the assignee's title by summary proceeding.

In re Ballou, 3 N. B. R., 717; Fed. Cas., No. 818,

where property, levied upon by execution, was by order

of the bankruptcy court delivered to its assignee, and was by him sold subject to its determination as to the validity of the lien claimed by the execution creditor, Mr. Justice Blatchford dismissed the petition, saying:

"The objection was taken, at the hearing, by the counsel for the firm, that, inasmuch as the proceeding instituted by the petition of the assignee is one against the firm as claiming an adverse interest touching property or rights of property of the bankrupt, transferable to or vested in the assignee, it is wholly irregular, because it was not brought upon a plenary bill in equity, but by a summary petition and an order to show cause. On the authority of the recent decision made in the circuit court for this district, in the case of *In re Bonesteel* [Case No. 1627] this objection must be held to be well taken. As the petition falls, the answer must fall with it, and also the prayer of the answer, that the assignee may be ordered to satisfy the execution out of the proceeds of the sale of the property levied upon."

In re Bonesteel, 3 N. B. R., 517; Fed. Cas., No. 1627.

There, upon a summary petition by an assignee in bankruptcy, against the wife of the bankrupt, the bankruptcy court had decided that certain stock held by the wife belonged to the bankrupt, and Mr. Justice Nelson, upon *petition for review,* set aside the decree as founded upon irregular proceedings.

See, also:

Barstow v. *Peckham,* 5 N. B. R., 72; Fed. Cas., No. 1064.

Rogers v. *Winsor,* 6 N. B. R., 246; Fed. Cas., 12,023.

Under these cases, the proceeding in the District

Court cannot be regarded as an independent suit—because, as such, that court was without jurisdiction of it—unless there is something in the present bankrupt act, which works a change in the law established by these cases.

But the present bankrupt act, instead of modifying, was adopted with reference to, and emphasizes, the principle of these cases. It imposes an express restriction upon the jurisdiction of the District Court over independent suits brought *by* the trustee in bankruptcy.

Section 2 of the present act confers jurisdiction upon the District Courts *as courts of bankruptcy,* among other things to "(7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, *except as herein otherwise provided.*" The italicized words, as this court has held in *Bardes* v. *Hawarden,* refer to section 23 of the act, that relating to the jurisdiction of the courts, which provides:

"(b). Suits by a trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Thus this statute declares that the District Courts shall not have jurisdiction of an independent suit brought *by* the trustee, when the defendant does not consent, but that the exclusive jurisdiction thereof shall be in such courts as the bankrupt might have resorted to, if no bankruptcy proceedings had been instituted. Here, then, is an express statutory limitation on jurisdiction.

The fact that, after the court had overruled their objections to jurisdiction, these petitioners followed the case—as, without a sacrifice, they could not otherwise do—does not amount to a waiver of these objections. Upon this point,

Louisville Trust Co. v. *Comingor*, 184 U. S., 18,

is a direct authority. In that case, to a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response denying jurisdiction, which the court refused to entertain, and he then participated in a hearing upon the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," he had assented to its jurisdiction. Upon *petition for review* the Circuit Court of Appeals reversed the bankruptcy court, and this court upon *certiorari*, affirmed the Circuit Court of Appeals. The Chief Justice, after stating the nature of the claim, said (italics ours):

"This brought the controversy within the ruling in *Bardes* v. *Bank*, 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of the District Court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there. * * *

The proceeding was purely summary. * * *

The question is whether the District Court had juris-

diction to finally adjudicate the merits in this proceeding. * * *

In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. *And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.*

We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

In re Baudouine, 101 Fed., 574; 41 C. C. A., 318.

It is a similar case. The District Court decided it had acquired jurisdiction, and the adverse claimant filed a *petition for review* in the Circuit Court of Appeals of the Second Circuit, which reversed the District Court.

These two cases are direct authority for the propositions, (1) that, by proceeding with the case, after their objections to jurisdiction were overruled, these petitioners did not waive their right to insist upon them in the appellate tribunals, and (2) that the proceeding in the District Court was a proceeding in bankruptcy, and was not an independent suit. Otherwise in *Louisville Trust Company* v. *Comingor, supra,*

both this court and the Circuit Court of Appeals were without jurisdiction, as was the Circuit Court of Appeals in *In re Baudouine, supra.*

Knight v. *Cheney* and *In re Bonesteel, supra,*—the law of 1867 not differing from the present act in this respect—were also reviewed by petition of review and not by appeal.

Hence, the proceeding in the District Court cannot be deemed an independent suit (from which an appeal would lie to the Circuit Court of Appeals under the Judiciary Act of 1891), because, by express statute the District Court had no jurisdiction of such a suit.

It does not, however, necessarily follow, that this proceeding is to be regarded as *coram non judice* in the District Court. It properly proceeded far enough to determine, whether it had jurisdiction, and, in doing so, it was acting within its jurisdiction of the bankruptcy proceeding.

Section 2 of the present bankrupt act makes the District Courts "courts of bankruptcy" and invests them with such jurisdiction as will enable them "to exercise original jurisdiction *in bankruptcy proceedings,* to * * * (7) cause the estates of bankrupts to be collected, *reduced to money,* and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

This section contains eighteen separate enumerations of powers, not necessary to be here set out. A reference to them will show that every one of them (except clause 4, which confers jurisdiction of crimes

against the bankrupt law) relates to the exercise of some power necessary to administer and distribute the bankrupt's estate. The exercise of each of these powers would give rise to some order in the bankruptcy case, considering all that takes place between the petition for adjudication and the last order in the case (as suggested by this court in *Lathrop* v. *Drake*, 91 U. S., 516) as one case. Clause 7 is, we conceive, no exception to this statement. The words "except as herein otherwise provided" are words of limitation upon the jurisdiction conferred by section 2 upon district courts *as courts of bankruptcy*, the jurisdiction which they have of independent suits being apparently conferred by other provisions of the statute.

By this clause (7) the law contemplates that the bankruptcy court, acting through a trustee, may proceed in the *collection* of the estate, until an adverse claimant in possession is reached, when it must stop, unless such claimant consents to have it decide the controversy.

So, too, the bankruptcy court is by this clause given jurisdiction of proceedings, wherein it is sought to have estates of bankrupts *reduced to money*, and it may determine certain controversies that may arise while so acting. Under this power it may proceed until a controversy is reached with an adverse claimant in possession, who objects to a hearing in the bankruptcy court, when it must stop. Where, therefore, in a proceeding to sell property, the court finds it to be in the possession of an adverse claimant, its jurisdiction to pro-

ceed is at an end by the express provision of the present statute.

This is in perfect harmony with the former bankrupt act, under which, as already shown, the bankruptcy court was without jurisdiction to order a sale of property (claimed by the trustee in bankruptcy) which was in the possession of an adverse claimant.

But from this it does not follow that the District Court was, in the case at bar, without jurisdiction *ab initio*. It necessarily must have jurisdiction to proceed up to the point of determining that there exists an adverse claim; that is, that the property is in the possession of an adverse claimant.

Louisville Trust Co. v. *Comingor*, 184 U. S., 18.
Mueller v. *Nugent*, 184 U. S., 1.
In re Baird, 116 Fed., 765.
In re Kane, 131 Fed., 386,

are authorities for this proposition.

The necessity for this is well illustrated by the case at bar. This proceeding started in the District Court by the receiver filing a petition which recited that the receiver "has taken possession of the property" in controversy. The petitioners at bar and the storage company filed pleadings denying this and claiming that the storage company had possession. Here, then, was a dispute as to possession. If the averments of the receiver's petition were true, the court had jurisdiction to sell. If the claim of the petitioners and the storage company should be sustained, the court was without jurisdiction to sell, because

without possession of the property to be sold. The District Court, acting as a court of bankruptcy and in the bankruptcy proceeding, had jurisdiction to determine, as it did, this controverted fact.

What, in this state of the case, if there had been in the meantime no sale, should the District Court have done? Clearly, ordered the property returned to the possession of the adverse claimants.

But, pending a hearing of this controversy, the District Court found it necessary to require the sale of the property and have the money held subject to its order. Does this change the situation? Clearly not. When it finally decided the possession to be in the adverse claimants, the only order it could properly have made was an order returning the money, as it did, to these adverse claimants.

Hence, the District Court, under its power, *as a court of bankruptcy,* acted properly in determining whether the property was in the possession of the receiver, that is, within its jurisdiction.

In this view, is it not clear that the proceeding was one in bankruptcy?

The Circuit Court of Appeals sustained the jurisdiction of the District Court upon the ground, that it had acquired a fund, and had jurisdiction, as any court would, to dispose of it. (Rec., 388.) But is the nature of a proceeding to be determined by the fact that the court has improperly seized property and turned it into money? If so, then a court of bankruptcy may create jurisdiction in itself where the statute expressly declares it shall have none. A court by its own improper

exercise of jurisdiction can give itself no jurisdiction whatever. If, under a misapprehension, or pending the ascertainment of a disputed fact upon which jurisdiction depends, the court seizes property and subsequently decides against its jurisdiction, the orderly administration of justice requires, that it return the property, or, if sold, the proceeds, to the party from whom it had improperly taken it.

Again, the nature of a proceeding should be determined by considering it as a whole, and not any part of it, nor any particular order in it.

But, even if jurisdiction existed in the District Court, because of its possession of this fund, to decide the merits of this disputed ownership, the case in that court was a proceeding in bankruptcy. This same Circuit Court of Appeals has expressly so decided in another similar case.

In re Antigo Screen Door Co., 123 Fed., 249; 59 C. C. A., 248.

Hence, under either view above stated, the case in the District Court was a proceeding in bankruptcy. Which of these views is the correct one is material here only in determining the extent, if any, to which the case was reviewable in the Circuit Court of Appeals.

II.

NO APPEAL LAY TO THE CIRCUIT COURT OF APPEALS.

The proceeding in the District Court being, then, "a proceeding in bankruptcy," the only jurisdiction which the Circuit Court of Appeals had thereof arose out of the following provisions of the bankrupt act of 1898:

Sec. 24 (*b*): "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Sec. 25 (*a*): "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit,

(1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) from a judgment granting or denying a discharge; and

(3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

The authorities agree that a judgment in a proceeding by or against a lien holder, which merely establishes or rejects the lien, and does not decide whether a claim is a provable debt in bankruptcy, is not a judgment allowing or rejecting the debt or claim within Sec. 25 (3) above.

In re Rouse, Hazard Company, 33 C. C. A., 356; 91 Fed., 96 (7th Cir.).

In re Worcester County, 42 C. C. A., 637; 102 Fed., 808 (1st Cir.).

In re Abraham, 35 C. C. A., 592; 93 Fed., 767 (5th Cir.).

In re Whitener, 44 C. C. A., 434; 105 Fed., 180 (5th Cir.).

Hutchinson v. *Otis,* 190 U. S., 552.

It follows, then, that no *appeal* lay from the District Court to the Circuit Court of Appeals.

III.

THE APPEAL COULD NOT PROPERLY BE TREATED AS A PETITION FOR REVISION.

Sec. 24b, *supra*, in conferring on the Circuit Courts of Appeals the right to "superintend and revise" bankruptcy proceedings, says: "Such power shall be exercised on due notice and *petition* by any party aggrieved."

In this respect it is more stringent that the bankrupt act of 1867, which provided that Circuit Courts should "have a general superintendence and jurisdiction of all cases and questions arising in the district court of such district when sitting as a court of bankruptcy, * * * and * * * may, upon bill, petition, or *other proper process*, of any party aggrieved, hear and determine the case as in a court of equity."

Stickney v. *Wilt*, 23 Wall., 150,

—a petition for revision in the Circuit Court, where there should have been an appeal from the District Court,—this court held, under the foregoing statute, that "the Circuit Court has no jurisdiction of the subject-matter in that form of proceeding." In other words, this court declined to allow a petition for revision to be treated as an appeal, and reversed the Circuit Court with directions to dismiss such petition.

Cleveland Ins. Co. v. *Globe Ins. Co.*, 98 U. S., 366.

There, this court held, under the act of 1867, that the Circuit Court was justified in treating a writ of

error as adequate "other process" under the above provision. In

Milner v. *Meek*, 95 U. S., 252,

this court held that, under the act of 1867, the Circuit Court might treat an appeal as a petition for revision, where the parties in the Circuit Court had expressly waived any irregularity by reason of the case being there by appeal instead of petition for revision.

It was doubtless because of this indefiniteness in practice under the act of 1867, that Congress, in passing the present act, provided that the jurisdiction of the Circuit Courts of Appeals to superintend and revise bankruptcy proceedings "shall be exercised on due notice and *petition* by any partly aggrieved."

This plainly contemplates the filing of a petition in the *Circuit Court of Appeals*, and a notice thereof to the adverse party. It is somewhat far-fetched to say this is met by a petition for appeal, which requires no notice and is filed, and remains, in the *District Court*.

It is for this reason that some Circuit Courts of Appeals have held that an appeal cannot be treated as a petition for revision.

In re Whitener, 44 C. C. A., 434; 105 Fed., 180.

In re Worcester County, 42 C. C. A., 637; 102 Fed., 808.

In the latter case the court, after referring to the different offices of appeal and petition for revision, said:

"It is plain that congress insisted on a distinction of a substantial nature, which we are not at liberty to disregard."

In this view the Circuit Court of Appeals should, when this point of jurisdiction was raised, have dismissed the appeal. Indeed, it should have done so, had counsel not raised the question.

M. C. & L. M. Ry. Co. v. *Swan*, 111 U. S., 379.

Hence, that court acted without jurisdiction, and *certiorari* is proper to correct this.

American Sugar Ref. Co. v. *New Orleans*, 181 U. S., 277.

Kingman v. *Western Manufacturing Co.*, 170 U. S., 675.

IV.

IF THE APPEAL WERE PROPERLY TREATED AS A PETITION FOR REVISION, THE CIRCUIT COURT OF APPEALS ERRED IN NOT CONFINING ITS ACTION TO REVISION IN MATTER OF LAW.

Some of the Circuit Courts of Appeals hold that an appeal, when none lies, may be treated as a petition for revision.

Chesapeake Shoe Co. v. *Seldner*, 122 Fed., 593. 58 C. C. A., 261.

If the Circuit Court of Appeals was justified in doing this—and thus only can its jurisdiction be sustained—still it should not have disregarded, as it did, the plain provisions of the bankruptcy act confining its jurisdiction in revision to "matter of law." Indeed, that court in a decision (*In re Antigo Screen Door Co.*, 123 Fed., 253, 59 C. C. A., 248) rendered the same day as its opinion in the case at bar, so held, saying:

"We are not at liberty upon a petition for review

to challenge the facts, or an inference of fact, found by the court below. We may only consider and rule upon a question of law."

Still that court in this case undertook to decide a question of fact, that is, whether the storage company had acquired possession, and reversed the District Court, because on this point it disagreed with that court. In this the Court of Appeals clearly erred, and this should result in reversal, unless in the record there is some question of law, which justifies the reversal of the District Court.

A petition for revision manifestly should disclose the concrete questions of law upon which revision is sought.

If, therefore, this appeal be treated as such petition, it only raises such questions of law as are therein distinctly pointed out by the assignments of error.

In this view, what are the questions of law that arise on this record?

Under the view urged in the first point of this brief, the District Court, in ordering the money returned to these petitioners, should perhaps have done so without prejudice to the right of respondents to litigate with petitioners in the state court. But the record in the Circuit Court of Appeals raised no such question. There is no assignment of error at all upon the *form* of the order or decree. Nor did respondents raise, or rely upon, this question in the Court of Appeals. It would seem, therefore, that this question is not a question for the decision of this court.

One question of law arising upon this record is, whether a bankruptcy court may, through its receiver,

seize and sell property in the possession of an adverse claimant. This has been already discussed.

If the District Court might, because it had the possession of the fund, lawfully decide the merits of this case, then the following *questions of law* also arise upon the referee's report, and are properly reviewable upon a petition for revision:

1. Whether, upon the facts shown in the report of the referee, the receipts issued by the Storage Company are to be deemed valid warehouse receipts, so that their endorsement by Rodgers to these petitioners, as security for loans, constituted valid pledges of the seed.

2. Whether, if the receipts are not to be deemed valid *as warehouse receipts,* the transactions are, upon the facts shown by such report, to be regarded as constituting valid pledges to these petitioners of such seed.

3. If there was no pledge, whether these petitioners under the facts above set forth, severally acquired equitable liens upon such seed that are superior to the title of the trustee in bankruptcy.

These are practically the same questions that are certified by this same Circuit Court of Appeals to this court, in case No. 424 upon the present docket of this court.

V.

THE RECEIPTS IN QUESTION ARE VALID WAREHOUSE RECEIPTS AND THEIR ENDORSEMENT CONSTITUTED VALID PLEDGES.

The referee's report recites that "the National Storage Company had no warehouses of its own, its business was carried on by taking a lease of a part or all of the premises occupied by a customer, fixing its name on said premises, or posting notices thereon, and issuing receipts on property stored therein by its customers." (Rec., p. 30.) It further recites that Rodgers, the bankrupt, on August 31, 1900, executed a lease to the National Storage Company of a portion of his warehouse in Chicago, at a nominal rent. He continued to use, in the conduct of his business, the balance of the premises. "Upon the execution of the lease the National Storage Company proceeded to take possession of the premises leased by it from the bankrupt by tacking on the walls of the several floors notices * * * about three by seven inches in size, * * * said signs being eight (8) in number, and distributed on the several floors and containing the following: 'This property controlled by the National Storage Company as public warehouse. Warehouse premises No. 281.' Said signs were placed some seven or eight feet from the floor on the side of the building and on partitions between the premises in question and the premises of the electric company [another tenant of the same building]. No signs were placed on the outside of the building." (Rec., 31.)

Simultaneously Rodgers applied to the storage company for the issuance of its storage warrants upon ten separate lots of seed in the leased premises. The inspector of the storage company, after verifying by count the quantity, placed on each lot a card about four by six inches in size. Upon this card was printed in letters about one-quarter of an inch in height, the words, "Warehouse Card, National Storage Company, * * * No Disturbance Permitted While This Card Is Posted." (Rec., p. 32.) "The sections where the several lots of timothy seed were stored were marked by wooden signs about eighteen inches to two feet square, painted upon or fastened upon beams of posts immediately over the front of each section." (Rec., p. 32.) Upon the second floor there were no wooden signs indicating the sections, but the lots there located were segregated, and these tags were attached thereto. "The dividing line between the sections was an imaginary line, indicated neither on the floor nor on the wall." (Rec., 33.)

Thereupon the storage warrants in question were issued in the form already set out.

"When it was desired to have the seed on which these receipts had been issued removed from the warehouse, application was made on a printed blank of the storage company, and it issued its release of the same on the surrender of the receipt, and the receipt was cancelled, the release delivered to the bankrupt, and the property shipped by the bankrupt from the warehouse. However, in some instances the bankrupt shipped out the property before the receipts were cancelled, although there is no evidence that the storage company knew it." (Rec., 34.)

"The floors were large open floors, about sixty by one hundred feet in size, and have no partitions except that the west end of the second floor was partitioned off and used as an office by the bankrupt. The entrance to the premises was by a door from Johnson street in the west end of the building, the keys to which were kept and controlled by Rodgers and his employes. * * *

After the lease was made and the first receipts were issued the storage company sent its inspector (so-called) to examine the property covered by the receipts, and to see that the same was in order and that the cards were in place, etc. He testified that he visited the premises of the bankrupt on an average of from fifteen to eighteen times a month. * * *

The bankrupt continued to do his ordinary business in the premises after his lease to the storage company, maintaing an office with sundry clerks and workmen about the premises. He bought and shipped seed, cleaned the same, and he testified that he occasionally cleaned seed on which receipts were issued, and which were thus in storage, by taking it out of the bags, cleaning it and restoring and adding a sufficient amount of other seed to equalize the loss in cleaning." (Rec., 36.)

In some instances the bankrupt, without the knowledge of the storage company, took from the storage premises seed and substituted other of like quantity in its place.

The referee further reports (Rec., 39) that he "did not see anything in the scheme of the business of the company that was contrary to law if it is properly carried out."

"The motives of the parties in making this arrangement are not claimed to have been fraudulent, nor is there anything to justify any such supposition. The bankrupt desired to borrow money on, or to sell his merchandise. * * * To have taken the seed to some

public warehouse and there stored it, and then issued receipts, would have been expensive. * * * It seems to me clear that the bankrupt had no authority to interfere in any manner with the goods stored." (Rec., 41.)

The referee then finds that the steps taken were "sufficient notice to any and all persons who might have occasion to know by going to the building and going inside, that the bags were in the possession of the storage company, and that the floor, or part of the floor on which the bags were stored, was consequently the floor of the storage company. * * * In other words, it seems to me the question is, would an attaching creditor or a purchaser, going in there and attempting to levy on or buy the property in question, as the property of the bankrupt, be notified by the signs and tags thereon that it was not the property of the bankrupt, but the property of the National Storage Company. I think that such a purchaser or attaching creditor would so find out that the property was not the property of the bankrupt, but the property of some one else. * * *

The conduct of all the parties was in good faith, without intent to cheat or defraud anyone. * * *

The segregation of the property, and disposition by tags, notices, etc., was sufficient notice to the world." (Rec., 42.)

The report then finds that the seed, and the premises on which it stood, were continually in the possession of the storage company from the 31st of August, until after the adjudication of bankruptcy. The report also finds that the receipts were sufficient warehouse receipts under the law of Illinois, and that their endorsement to the petitioners constituted valid transfers of the property they represented.

The general method of warehousing here disclosed is not confined to this case nor to this company. It is an extensive business of another like company, the

validity of whose receipts are involved in case No. 424 upon the present docket of this court.

Indeed, it is a matter of such general knowledge, that this court may well take judicial notice, that sundry like companies are engaged in the same kind of warehousing, and that warehouse receipts issued in the manner disclosed by this record have extensively become instruments of commerce, and are the basis of transactions upon at least one commercial exchange in this country.

It may be aptly styled a new system of warehousing. Its origin is to be found in the requirements of modern commerce. It results from the commendable aim of business men to minimize the cost of production and distribution, which has given rise to the commercial exchange, the clearing house of the banks and many other like trade-facilities of recent date.

The principle of evolution finds exemplification in the business of warehousing. Take, for illustration, the warehousing of grain. The original theory of warehousing required the return to the depositor of the identical grain deposited, either as grain or flour. But it soon became impracticable to keep each person's grain by itself. Only the equivalent in quantity of his grain could well be returned to the depositor. At first the law declared that, where grain stored in a warehouse was not kept separate from that of others, the relation between the depositor and the warehouseman was only that of debtor and creditor.

This was attended with too many inconveniences to withstand the demands of commerce. As the trade in grain grew, the law was compelled to recognize "bulk"

warehousing in grain, and permit the grain of different depositors to be mixed together without destroying the title of each to his undivided part of the mass. While this change in the law was accomplished in Illinois and some states through legislation, in Iowa (*Sexton* v. *Graham*, 53 Iowa, 181) and many other states it resulted without statute, and because the courts felt under the necessity of conforming the law to the requirements of modern commerce.

Another change in the business of warehousing is presented by the method disclosed in this case. Commerce has found that many articles of trade can not, because of the expense of removal, be carried to a central or general warehouse for storage, but must be warehoused, if at all, at or near the point of production or distribution. Especially in the South, where the amount of capital available for business is limited, has it been found helpful to manufacturers to resort to this method of warehousing. Thereby pig iron and other raw and manufactured products are, for commercial purposes, turned into storage warrants, by the use of which available capital is more readily secured, and thus manufactories are operated more continuously, and labor is more steadily employed.

Again, many towns where factories are located are too small to sustain a general warehouse. The removal of many articles of manufacture from such a town to a general warehouse in a larger place would be so expensive, relative to the value of the goods and the profits of manufacture, as to preclude their being warehoused at all in that way.

Such are the business necessities that have given rise to this new system of warehousing. To withhold from it legal sanction is to place at a disadvantage many manufacturers and distributors, who seek to utilize their property to increase their working capital, as others, differently circumstanced, do. So, the question here is—as it was in the case of bulk warehousing of grain—whether the law will obstruct, or conform to, the requirements of modern commerce.

This new system asks of the courts no *new* law. It only seeks to have applied to its transactions the same law, that has for many years been applied to other analogous cases.

Doubtless it is competent for a state, within constitutional limits, to regulate warehousing within its borders, and declare what shall constitute a warehouse and what a warehouse receipt. The State of Illinois, however, has not, as respects this kind of warehousing, seen fit to adopt any statute imposing any restrictions.

Article XIII, Sec. 1 of the Illinois Constitution of 1870 provides:

"All elevators or store houses where grain or other property is stored for compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

Other sections of the same article deal with the warehousing of grain and impose upon the legislature the duty of passing laws for the inspection of grain and for the protection of producers and shippers of grain.

In compliance with this mandate the legislature

passed a statute, the 1st, 2nd and 24th clauses of which are as follows (R. S., Ill., Chapter 114):

Sec. 1. "Public warehouses, as defined in article 13 of the constitution of this state, shall be divided into three classes, to be designated as classes A, B and C, respectively."

Sec. 2. "Public warehouses of class A shall embrace all warehouses, elevators and granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators or granaries being located in cities having not less than 100,000 inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of class C shall embrace all other warehouses or places where property of any kind is stored for a consideration."

Sec. 24. "Warehouse receipts for property stored in any class of public warehouses, as herein described, shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another. All warehouse receipts for property stored in public warehouses of class C shall distinctly state on their face the brand or distinguishing marks upon such property."

Most of the other sections of the act formulate an elaborate system of storing grain in bulk, and require it to be inspected as it goes in and out of warehouses. The remaining sections aim to secure honest warehousing. None are pertinent to the questions arising here.

Section 24, above quoted, is, as respects the trans-

ferability of the receipt, but declaratory of the common law, as will be manifest from the authorities hereinafter cited.

The leased premises in the case at bar fall within this constitutional definitition of a public warehouse; for this was a place where property was stored for compensation. (Here see *Union Trust Co.* v. *Trumbull,* 137 Ill., 146, hereinafter referred to.)

In any event, there is in these provisions no state prohibition of, nor restriction upon, this method of warehousing.

As these receipts were issued, and cover property, in Illinois, any authoritative decision of its courts would doubtless control. (*Hervey* v. *Rhode Island Works,* 93 U. S., 664.) But there is no such decision.

If, therefore, the leased premises are to be adjudged not a warehouse, and these receipts not warehouse receipts, it must be because of some inhibition in the common or general law. Is there, then, any such prohibition?

By the law of Illinois, as by the law generally, the transfer of personal property, either absolutely or by way of security, must, as against subsequent purchasers, lien holders, and levying creditors, be accompanied by a change of possession, except in the case of a chattel mortgage where by statute recording is made an alternative. In this respect there is no distinction between a sale or pledge without, and one made through, the intervention of a bailee (warehouseman).

Because of this rule of law, it is essential to the legality of every kind of warehousing, and of all re-

ceipts, that the warehouseman should have the possession and control of the property covered by his receipts.

The only substantial difference between this kind of warehousing and ordinary warehousing is, that in the former the warehouseman, instead of having one building, in which is stored the goods of all his depositors, may have numerous rooms or premises in a single city or town, and these are so located that, as a rule, only one depositor resorts to each of them. But there is no legal reason for requiring a warehouseman to have all his rooms under one roof, nor all the property stored by him in one building. Would not all his rooms, although located at different places, be deemed in contemplation of law, as his warehouse? Other legal requirements being met, of what legal consequence is it that his warehousing space is thus divided?

The only objection urged against this system of warehousing is the argument of false credit or secret lien; but this applies here with no greater force than in the case of a sale, or direct pledge, or unrecorded chattel mortgage. In such cases an open and visible change of possession is deemed sufficient. Why is this not so also in this case of warehousing?

In considering the question, what constitutes a change of posession, this distinction should be noted. As between a vendor and vendee, anything indicating the intention of the parties that the former should release the control of the property and the latter assume it, is sufficient to pass title, make the purchase price due, or locate the loss in case of destruction by fire. But, as between the vendee, and

levying creditors, subsequent encumbrancers and purchasers of the vendor, the law not only requires a change of possession, but that it be open and visible.

What constitutes such a change of possession, as against the parties last named, is also sufficient in law as between a pledgee or chattel mortgagee, and subsequent purchasers, or levying creditors, of his pledgor or mortgagor.

So, the reason being the same, the extent to which a change of possession is required, must be the same between a warehouseman and his receipt holders on the one side, and purchasers from, or levying creditors of, the bailor on the other side.

Hence, authorities holding the change of possession sufficient in the case of a sale, pledge or chattel mortgage are equally in point in the case at bar.

The real question then is, whether the placing of property upon premises leased to a vendee or pledgee or warehouseman, accompanied by a continuous display of signs plainly indicating the vendee's, pledgee's or warehouseman's interest, constitutes a sufficient change of possession to make the transaction unassailable. It is believed that the following cases amply warrant an affirmative answer to this question.

Hatch v. *Oil Company,* 100 U. S., 124:

In that case a firm agreed to manufacture and sell staves to the Oil Company, and leased to that company a tract of land adjoining the firm's mill, upon which the staves were piled as manufactured and counted by an agent of the Oil Company. Before anything else had been done in the way of changing pos-

session, creditors of the manufacturers levied execution on the staves and contended that, as against them, there had been "no actual or continued change of possession" within the meaning of the statute of Michigan, where the property was located. But the court awarded the staves to the Oil Company, saying:

"Actual delivery of the staves having been proved, it is not necessary to make any reply to the defense set up under the State statute in respect to the sale of goods unaccompanied by a change of possession."

Sumner v. *Hamlet*, 12 Pick., 76:

In that case a manufacturer of flannel obtained a loan from defendant upon the security of forty-five pieces of cloth, and it was arranged that these pieces should be placed in charge of one Guild, foreman of the factory. This foreman selected forty-five pieces of cloth, and they were set apart and marked with the defendant's initials, but were not removed from the factory. Being subsequently levied upon by a creditor of the manufacturer, Chief Justice Shaw upheld the pledge, saying (p. 82):

"We are also of opinion, that the *lien* thus created was maintained by the possession of Guild. Whatever was the nature of his general relation to the proprietors of the manufactory, in this particular transaction he was constituted the special agent of the defendant, for the purpose of keeping possession for him, although in other respects the servant of Stanley & Co. • • • To constitute such special possession, it was not necessary that the goods should be removed from the premises of the former owners; it was sufficient that they were so far in the custody of the special bailee, that he could at all times have the legal control of them, and give notice of the lien to any purchaser

and attaching creditor, and remove the goods if such removal should be necessary for the safety of the principal."

First National Bank v. *Pennsylvania Trust Company,* 124 Fed., 968; 60 C. C. A., 100:

There a steel company borrowed money from a bank, and executed to it a bill of sale of certain billets, which were permitted to remain on the premises of the company. The billets were marked by a sign posted on the several piles, reciting that they were the property of the bank. The steel company was then adjudged a bankrupt, and its trustee resisted the claim of the bank to a lien upon the billets; but the Circuit Court of Appeals of the Third Circuit upheld the lien saying (p. 969):

"It cannot be disputed that on the 30th day of August, 1901, when the bank discounted the note of the steel company, and took the bill of sale of the billets, it acquired a good and valid title thereto as between itself and the steel company. To complete its title or lien as against creditors and strangers, the bank was not obliged to take the billets into actual possession; it was sufficient to give notice of their lien or change of ownership. This they did by posting on the billets, which were in distinct and separate piles, the sign to which reference has been made, so that on August 30, 1901, the title of the bank or its right to a lien on the billets was good as against all of the world."

Bank of Rome v. *Haselton,* 83 Tenn., 216:

In that case material belonging to an iron company was stored in a warehouse forming a part of its plant, which was leased to one Lowe, but for which he paid no rent. Other material consisting of pig iron, etc., was stored outside of this warehouse in yards around the

iron company's works. Thereupon Lowe issued to the iron company warehouse receipts for the property thus stored, and the latter delivered them to various parties to secure loans. Subsequently attaching creditors levied upon the property, and insisted that the receipts were invalid, because the possession of the property had never been in Lowe, but remained with the iron company. But the lien of Lowe was upheld, the court saying (p. 247):

"In short, the actual possession was in Lowe; the property was in the warehouse or on the yard when the receipts were given, and they are not invalid for the want of possession by the warehouseman and consequent authority to issue them."

Sharp, Assignee, v. *Philadelphia Warehouse Co.,* 9 Reporter, 572:

There a dealer in goat skins leased the cellar of his store to the Warehousing Company at a nominal rent, and merchandise of such dealer was placed in this cellar, and on the security thereof loans were made by the company to this dealer, who subsequently was adjudged a bankrupt, and a bill was filed by his assignee in the federal circuit court at Philadelphia, seeking to adjudge the pledge fraudulent and void, as against creditors of the bankrupt, upon the ground that there had been "no change of possession, although the goods were capable of actual delivery," but the court upheld the pledge, saying:

"As respects the goods placed in the cellar, we see no room for controversy. Leasing the cellar and removing the goods thereto, constituted a sufficient delivery to satisfy the requirements of law."

Kentucky Furnace Co. v. *City Bank,* 25 Ky. Law Rep., 28:

That case affirms the validity of warehouse receipts issued under circumstances similar to those at bar, the Court of Appeals saying:

"The Kentucky Furnace Co. leased to J. P. Holt a part of its ground and then placed upon the ground so leased its pig iron, and Holt issued to it warehouse receipts therefor. These warehouse receipts it pledged to appellee for money loaned. The pig iron was stacked on the ground and was marked by Holt with chalk marks 'C. N. B.', after the pledge of the certificates, to show that it belong to appellee, the City National Bank. * * * The arrangement was in perfect good faith; the property on which the bank held a lien was separated and marked, and the lien of the bank was recognized by the furnace company. After all this, on August 6, 1900, the furnace company became bankrupt, and appellant was elected trustee of the bankrupt estate. * * * Appellant, after this, brought the suit before us, alleging that he had demanded the possession of the property from the bank that he might administer upon it as part of the bankrupt estate, and praying judgment against it for the property. * * *

This was a valid pledge, and the circuit court properly enforced it."

Fidelity Co. v. *Roanoke Iron Co.*, 81 Fed., 439:

In that case an iron company borrowed money from a warehouse company upon the security of certain iron, and the court said:

"The warehouse company therefore leased parcels of land from the iron company next to the cast house of the iron company, and on this the iron was stored; the warehouse company having an agent specially designated in charge of their iron, and signs being put up on the premises on which appeared 'Storage Yard Philadelphia Warehouse Company.' * * *

The first question is, was this arrangement between the iron company and the warehouse company a valid

pledge? * * * The question must be answered in the affirmative."

American Warrant Co. v. *German,* 126 Ala., 194.

There the court in sustaining the validity of a pledge against the claim of a subsequent pledgee of the same pledgor, said (p. 239):

"In this case it is clearly proven that under the agreement of pledge between the furnace company acting by its president and Verchot, a particular spot of ground belonging to that company and located apart from its own iron yards was tendered by the president and accepted by Verchot for his use and that a quantity of iron was placed thereon, piled in 100 ton lots and marked with paint with Verchot's initials."

Dunn v. *Train,* 125 Fed., 221; 60 C. C. A., 113: There the plaintiff loaned money to a paper company and took as security certain paper, which remained at the mill of the paper company in the custody of an agent appointed for that purpose. The Circuit Court of Appeals of the First Circuit upheld the pledge, saying (italics ours):

"This case must therefore turn upon the question of delivery and acceptance, or, in other words, upon change of possession. * * *

It being a question of intention, and a question whether the change in the situation of the property was such as to be *notice of a change of possession,* it was, under the circumstances, largely a question of fact, to be determined under the rules of law. * * *

It was further found as fact that from the said 31st day of August the paper company for a time delivered to Mr. Kline, under this arrangement, all the finished product of the mill, the place of such deposit being accessible from other portions of the mill; that paper thus deposited remained where it was de-

posited in the mill, apart by itself, not confused with any other paper, until December 30, 1895, at which time the paper company had constructed a new storehouse, and thereupon the paper which had been already delivered and deposited in the basement and shipping room of the mill, as above stated, was transferred to the new storehouse, and remained under the care of Gedney, who had been appointed the agent of Train, Smith & Co. [the creditors], where it remained apart from all other paper until replevied. * * *

Nor is there any absolute rule of law which requires property pledged to be removed from the premises of the pledgor. *It is enough if the facts sufficiently show that the goods are actually set apart in the keeping of the special bailee, with authority to notify third persons that they are held in pledge,* and to remove the goods, if found necessary for the safety of his principal."

Allen v. *Hollander,* 128 Fed., 159.

There the debtor, a dealer in carriages, undertook to transfer certain carriages to a creditor to be sold by him, the proceeds to be applied on the indebtedness. The carriages were delivered to an agent of the creditor, who removed them *into a separate room in the debtor's warehouse,* where they were tagged with the creditor's name and there left to be sold by his agent, and the pledge was upheld.

Other like cases might be cited, but the foregoing are thought sufficient to show that, under the rule in transfers of property, the change of possession in the case at bar was a sufficiently open and visible one. All that the authorities require is such change as shall give notice to third parties. In view of the referee's finding it can hardly be contended that the steps taken were not ample to notify anyone seeing

the property that it was in the possession of the Storage Company.

Were, then, the receipts of such a character that their endorsement and delivery were tantamount to the delivery of the property itself?

It was clearly the purpose of that company to assume, and of Rodgers to have it assume, the position and responsibility of a warehouseman. When Rodgers borrowed the money from petitioners, it was the clear intention of all these parties, that the receipts should be regarded as symbols of the property and their delivery should constitute valid pledges. Should not the law so hold?

This question finds an affirmative answer in the following cases:

Gibson v. *Stevens*, 8 How., 383.

There a firm bought 350 barrels of pork and 200 barrels of flour, which then were in warehouses of the two sellers, and there remained until seized as hereinafter stated. This firm then borrowed money from Gibson, and delivered to him as security, after endorsing upon the back of each an order for delivery to him or his order, certain documents issued by these sellers and reciting that they held the property subject to the buyer's orders. The sellers do not appear to have been warehousemen. Subsequently creditors of the firm levied on the property in controversy, and contended that the delivery of the documents did not constitute a pledge, because (1) the documents did "not amount to warehouse receipts"; and (2) there being no statute in New York nor Indiana making their

transfer tantamount to the delivery of property, they could not be accorded that effect. But this court, through the Chief Justice, upheld the pledge, saying:

"The transaction, therefore, being in the usual course of trade, and free from all suspicion of bad faith on the part of the plaintiff [Gibson], the question to be decided is, what was the legal effect of the indorsement and delivery of the warehouse documents, in consideration of the advance of money he then made to McQueen & McKay? In the opinion of the court, it transferred to him the legal title and constructive possession of the property; and the warehousemen from the time of this transfer became his bailees, and held the pork and flour for him. The delivery of the evidences of title and the orders indorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself.

This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justice in England and this country, and is absolutely necessary for the purposes of commerce. * * *

The indorsement of the delivery order upon these evidences of his title, like the indorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson. And when that intention is evident from the language of the written instruments and the nature and character of the contract, it is the duty of the court to carry it into execution without embarrassing it with needless formalities. * * *

Nor, as respects the legal title, can there be any distinction between the advance made by Gibson, and the case of an actual purchaser. To the extent of his advances he is a purchaser, and the legal title was conveyed to him to protect his advances."

In a note to *Lickbarrow* v. *Mason,* Smith's Leading Cas., 7th Am. Ed., Vol. 1, Part 2, p. 1197, it is said:

"The exigencies of trade have called a class of instruments into being, which are substantially ac-

knowledgments by public or *private* agents that they have received merchandise, and from whom or on whose account, and usage has made the possession of such documents equivalent to the possession of the property itself. Thus warrants or receipts are habitually issued for the merchandise deposited in the various warehouses in England; and * * * a sale attended by the transfer of such an instrument, is as effectual as if the property were handed over to the purchaser."

Northrop v. *First National Bank*, 27 Ill. App., 527.

There a receipt issued by one, not a warehouseman, and providing that the property was "deliverable only on surrender of this receipt," was pledged for a loan, and the pledgee recovered in an action of replevin, the Appellate Court saying (italics ours):

"The *quasi* negotiable character of warehouse receipts was judicially recognized long before the act of the legislature of this state for the regulation of public warehouses was passed. Prior to that time the principle applied by the courts was, that the delivery of warehouse receipts is a symbolic delivery of the property itself, and that it has the same effect as the delivery of the property and can have no greater, and that a transfer of the warehouse receipt, by the person in possession of it, gives no higher title than would the transfer of the property by the same person. * * *

That such is the rule adopted in this State, and that warehouse receipts issued by *private agents or by warehousemen, other than those described as public warehousemen,* are placed on the same footing as bills of lading, in respect to their *quasi* negotiable character, we have no reason to doubt."

In a subsequent case, decided in 1897,

Montgomery Ward & Co. v. *Am. Trust & Sav. Bank*, 71 Ill. App., 20,

the same court decided the same way.

These decisions, while not authoritative, are entitled to consideration as showing what the lower courts in Illinois regard as its law on the subject under consideration.

Millhiser Mfg. Co. v. *Gallego Mills Co.*, 101 Va., 579.

There a corporation, engaged in milling flour, also maintained a warehouse, and issued certain warehouse receipts upon grain in its warehouse, without causing itself to be licensed pursuant to a statute of Virginia providing for the licensing of warehouses, and (in language not unlike Sec. 24 of the Illinois Warehouse Act above quoted) that warehouse receipts issued by persons keeping a *licensed* warehouse should be transferable by endorsement, and the assignee of such receipt should be deemed the owner of the property, so far as to give effect to a sale or pledge to him. In a contest for priority between the holders of these receipts and other lien holders the court said:

"A place adapted to the reception and storage of goods and merchandise is a warehouse at common law. Bouvier's L. D. 1211. * * *

Having considered the nature and effect of the warehouse receipts and elevator certificates involved in this case and reached the conclusion that they, like a bill of lading, at common law, represent the goods therein, and that the transfer of the ownership as well as the right of possession is made as effectually by their transfer and delivery as it can be by a physical delivery of the goods, we are brought directly to the question whether or not Chapter 82 of the Code abrogates the common law with respect to such receipts or certificates and invalidates them and all of like character where not issued by a licensed warehouse whose owner or proprietor has complied with the statute. * * *

We regard the statute, Chap. 82 of the Code, *supra*, as merely declaratory of the common law as applied to *licensed* warehouses under that statute, adding that such provisions as were deemed essential for the better protection of the holders of such receipts, not a sentence or a word even of negation of the common law being contained in the statute."

See, also,

Rice v. *Cutler*, 17 Wis., 362.

Under the authority of these cases the endorsement and delivery of the warehouse receipts in question constituted pledges, even if the National Storage Company should not be deemed a *public* warehouseman under the Illinois statute.

But *Union Trust Company* v. *Trumbull*, 137 Ill., 146, (decided in 1891 and hereafter more fully set out), supports the position that this storage company was a public warehouseman under that statute. In that case the endorsement of receipts, issued by this same storage company, was held not to create a legal pledge, but this was expressly put upon the grounds (1) that the storage company had not taken or maintained adequate possession, and (2) that it had not complied with the Illinois warehouse act (which relates only to public warehouses), in that it had not separated and marked the wool covered by each receipt so that it could be identified by its receipt. The necessary inference is that, but for these two defects, the receipts, when endorsed as security, would have been valid pledges; in other words, that the storage company was within that statute—that is, a public warehouseman.

Without referring further to the numerous cases, they easily justify the proposition, that receipts issued

by one engaged in the business of storing, for a compensation, goods not his own—whether a statutory (public), or only a private, warehouseman,—are such documents that their endorsement and delivery are tantamount to delivery of the property itself, and create legal pledges.

Hence, these warrants were valid warehouse receipts and their endorsement to petitioners constituted valid pledges.

VI.

IF THESE DOCUMENTS WERE NOT WAREHOUSE RECEIPTS, STILL THE TRANSACTIONS CONSTITUTED VALID PLEDGES BY RODGERS TO PETITIONERS.

If Rodgers had proposed directly to petitioners that, to secure their loans, he would lease to them this space, and put therein this property, and place on the premises and property signs amply indicating that they were in their possession, and this proposition had been accepted, and this situation maintained, until his bankruptcy, there would, it is believed, be no question that the transaction would constitute pledges valid against the world.

The same conclusion would inevitably follow, if, instead of doing this, the parties had selected a special custodian, upon whom should be cast the responsibility of maintaining the custody and possession of the property. A transaction is none the less a pledge because, instead of the pledgee taking possession himself, a custodian does so for him. A transaction is none the less a pledge because the person, who acts as such

custodian, *makes a business* of doing so. A subsequent ratification being equivalent to a previous authority, the acceptance by petitioners of the receipts of the storage company, when tendered upon the loans, was equivalent to the petitioners' ratification of Rodgers' selection of the storage company as their custodian.

In the receipts it is expressly provided that "this company shall, in the custody of the above property, be the agent of the holder of this warrant." (Rec., 136.)

Hence, the transactions were valid as pledges, even if the receipts be not regarded as strictly warehouse receipts. This view was adopted in

Proctor v. *Shotwell,* 79 S. W. Rep., 728,

where the validity of receipts issued under conditions similar to those at bar by a company doing a similar business, was upheld, the court saying:

"Much has been said by plaintiff to show that the receipt held by interpleader was not what is technically known as a 'warehouse receipt,' and that its transfer to interpleader did not, and could not, transfer possession of the property. It can make no difference in the result which must be reached in this case whether the institution styled 'Merchants & Manufacturers' Warehousing Company of New York' was what would properly be designated a 'warehouseman.' It was in the possession of the grain, and was at least a bailee."

Kentucky Furnace Co. v. *City Bank,* 25 Ky. Law Rep., 28,

(already cited) where the validity of warehouse receipts issued under circumstances similar to those at bar was involved, the court said:

"It is insisted for appellant that the warehouse receipts issued by Holt were not warranted by section

4771, Kentucky Statutes, on the ground that he was not a warehouseman within the meaning of the statute. We do not deem it necessary to decide this point, and no opinion is intimated thereon. The evidence clearly shows that appellee was given a lien on the 113 tons of pig iron in controversy, and that it was set apart and identified beyond question. Holt had charge of it as the agent of the bank. He held it for the bank. It was placed in his possession for this purpose, and the evidence is undisputed that he informed the bank that he held the iron for it, and the bank instructed him to keep it safely. This was a valid pledge, and the circuit court properly enforced it."

To this position a change of possession is essential.

But it has been shown under the last point that there was a sufficient change of possession, and this was maintained up to the time of the bankruptcy.

VII.

IF THERE WAS NO PLEDGE, STILL PETITIONERS ACQUIRED EQUITABLE LIENS THAT ARE SUPERIOR TO THE TITLE OF THE TRUSTEE IN BANKRUPTCY.

1. Upon the question, whether an equitable lien existed, the Illinois law is controlling. It is no longer an open question in that state, that the delivery by Rodgers of these receipts, as security for loans, even if no actual change of possession took place, created equitable liens in favor of petitioners. This identical question is decided in

Union Trust Company v. *Trumbull,* 137 Ill., 146,

where the endorsement of similar warehouse receipts,

issued by the same storage company, did not constitute a valid pledge, because there was no change of possession, but it was held to create an equitable lien, the court saying (p. 175):

"It is, however, insisted, that even if there was no valid legal pledge of the wool which was in the warehouse at the time of the assignment, yet that, under the circumstances of the case, the holders of the warehouse receipts are entitled to an equitable lien thereon, which, although not recognizable at law, a court of chancery will enforce. * * * These receipts were issued by a duly incorporated storage company, and expressly stated upon their faces that the company had received and was in possession of the number of pounds of 'unwashed wool.' * * * The receipts, upon their faces, indicated that the storage company had complied with the law. * * * The receipt holders were without notice of any fact in derogation of the validity of their receipts. There was an intention and an ineffectual attempt to secure the repayment of the borrowed moneys by creating valid legal pledges. Equity regards that done which ought to be done."

Equitable liens have also been upheld by this court in

Hauselt v. *Harrison*, 105 U. S., 401;
Walker v. *Brown*, 165 U. S., 654.

2. The question, then, is, whether such equitable lien is superior to the title of the trustee in bankruptcy.

It was expressly so held under the bankrupt act of 1841.

Fletcher v. *Morey*, 2 Story, 555; Fed. Cas., 4,864.

Winsor v. *McLellan*, 2 Story, 492; Fed. Cas., 17,887.

Such, also, was the law under the bankrupt act of 1867.

Hauselt v. *Harrison,* 105 U. S., 401.
Yeatman v. *Savings Inst.,* 95 U. S., 764.
Stewart v. *Platt,* 101 U. S., 731.

Does, then, the present bankrupt act intend to change this rule? Its provisions, so far as they have any bearing on this question, are (italics ours):

"Sec. 67. Liens. (a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. * * *

(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

(e) That all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and *within four months prior* to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, *except as to purchasers in good faith and for a present fair consideration;* and all property of the debtor conveyed, transferred, assigned, or encumbered *as aforesaid* shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time *within four months prior* to the filing of the petition against him,

and *while insolvent*, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

"Sec. 70. Title to property. (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law *with the title of the bankrupt*, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *

(e) The trustee may avoid *any* transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, *unless he was a bona fide holder for value* prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, *except a bona fide holder for value.*"

Considering first these clauses separately—

Clause (a) of Sec. 67, standing by itself, seems to declare that in states, like Illinois, where an equitable lien does not prevail against attachments and executions, it is not enforceable against the bankrupt's estate.

Clause (d) of Sec. 67, standing by itself, makes such an equitable lien superior to the trustee's title. The

word "necessary" in this clause is equivalent to "required by the statute of the state." It declares that liens "accepted in good faith and not in contemplation of, or in fraud upon this act, and for a present consideration," and recorded,—when of a kind the state law requires to be recorded,—shall be upheld, notwithstanding the other provisions of the bankrupt act. Clearly this clause is not confined to liens that are recordable, or required to be recorded, but applies equally to liens, the recording of which the state law does not contemplate. Otherwise, the phrase "if record thereof was necessary," etc., would be out of place.

Of this character are equitable liens. There is no provision in Illinois for the recording of such liens. Indeed, such a provision would not be feasible, as equitable liens frequently arise out of acts—and sometimes out of acts amounting to estoppels—not reducible to documents, and hence not susceptible of being recorded.

Reading these clauses (a) and (d) together, as they should be, the proper construction is (1) that liens "accepted in good faith," etc., and which are of a nature to be recorded, such as chattel mortgages, are not good against the estate unless recorded; but (2) that liens "accepted in good faith," etc., but not of a nature to be recorded, shall be unaffected by the bankrupt act, although not superior to writs of attachment and execution.

This will be more apparent by considering the subsequent clauses above quoted.

Clause (e) is confined (1) to fraudulent conveyances

within four months prior to the filing of the petition in bankruptcy, which are made "null and void" by force of the bankrupt act itself, and without reference to any state law, and (2) conveyances *during insolvency* and within said four months, which are by the state law invalid as to creditors. The only relevancy of this clause to the present inquiry is, that it emphasizes the purpose of the bankrupt act to protect "purchasers [and encumbrancers] in good faith and for a present fair consideration."

Clause (a) of Sec. 70 above quoted, defines the *title* which the trustee takes. In strict logical order it should perhaps have preceded the above provisions of Sec. 67. It vests in the trustee *only* "the title of the bankrupt" to the property enumerated in its six numbered paragraphs. Under this clause the title to the seed in controversy vested in the trustee subject, not only to any pledge or mortgage, but to this equitable lien; that is, he took the title in the same plight in which the bankrupt held it.

That Congress used the words "title of the bankrupt" advisedly and in this sense, seems apparent from the fact that, under former bankrupt acts, this court had uniformly held that the assignee in bankruptcy took subject to liens and equities—that is, in the same plight in which the bankrupt held—and that the only further right the assignee took was the right, not of the bankrupt, but of his creditors, to avoid fraudulent conveyances.

But it is suggested that subdivision (4) of this clause shows that something more than the title of the bankrupt is here contemplated, because a bankrupt has him-

self no title to property fraudulently transferred by him. But this is not always true. If a fraudulent transfer is other than an absolute one, the bankrupt still has title subject to the encumbrance.

Again it is said that this clause is not to be confined to the title of the bankrupt, because subdivision (5) thereof refers to property which might have been sold under judicial process, and, under the Illinois law, this seed might have been levied upon and sold free from the equitable lien.

This view can only prevail by nullifying the controlling words, "title of the bankrupt"; but, in construing a statute, all words are, if possible, to be given effect. Phrases, like subdivision (5), which are general in their terms and made broad, by way of caution, should not, in construction, be allowed to lessen definite phrases like "title of the bankrupt."

But any reasonable doubt as to the intention of Congress disappears when clause (e) of Sec. 70, above quoted, is considered. It is this clause, and not subdivision (4) of clause (a), Sec. 70, that confers upon the trustee the right to avoid fraudulent conveyances made more than four months before the proceedings in bankruptcy. It confers upon the trustee the right to avoid any transfer—whether absolute or by way of security—of the bankrupt, which any of his creditors might, under the state law, have avoided, *provided* the person, against whom recovery is sought, is not "a *bona fide* holder for value." It emphasizes, what is also apparent in clause (e) of Sec. 67, that the intention of the bankrupt act is to preserve the rights of innocent persons. Considered by itself, this clause clearly

preserves the rights of persons—such as petitioners are—who innocently and for a present consideration, have acquired equitable liens upon the property of a bankrupt.

Considered in connection with the other clauses, the result is the same. This clause (e) must, being the latest, be deemed a limitation, in favor of innocent holders for value, upon any right conferred upon the trustee by any prior provision of the act. Hence it is a limitation or qualification of clause (a) of Sec. 67. This is well expressed by District Judge Clark in an unpublished opinion, in a case, in the United States Circuit Court for Tennessee, involving the validity of warehouse receipts issued by the warehousing company involved in said case No. 424.

"It seems open to the trustee, under the above statute, to follow the property fraudulently conveyed, or the proceeds of such property, into the hands of whoever may have received it, until a *bona fide* purchaser is reached, and that the statute makes this a limit, beyond which the trustee may not go. * * * The creditor's right is passed to and vested in the trustee by operation of the bankruptcy law subject to the limitation that the right of a *bona fide* purchaser or holder must not be disturbed or divested.

The purpose to guard the right of a *bona fide* purchaser or holder is everywhere manifested on the face of the Bankruptcy Act, as amended by the act of 1903.

This protection of the right of a *bona fide* purchaser is necessary in order to uphold sound commercial policy and confidence, and to avoid inflicting upon the innocent the unnecessary and harsh disadvantage of frequent and serious loss."

As a result of construing together, and giving effect to, all the provisions above quoted, the following propositions seem to state the intention of Congress:

1. The trustee is first vested with the *title of the bankrupt* to all property fraudulently conveyed, and to all property the latter might have transferred, or which might have been sold under legal process against him; that is, *with the estate of the bankrupt in the same plight, in which the bankrupt held it.*

2. The trustee is also invested with the right to avoid all liens that are invalid against creditors, except those taken in good faith and not in contravention of, or in fraud under, this act, and for a present consideration, and—when required by the state law to be—recorded. This is without regard to what the state law is.

3. The trustee is further invested (independent of any state statute) with the right to avoid conveyances in fraud of creditors made within four months of the bankruptcy proceedings, except as against purchasers in good faith and for a present consideration. He may also avoid such transfers, made *during insolvency* and within said four months, as are invalid against creditors by the state law.

4. The trustee is invested with the power, beyond the four months, to avoid *any* transfer, whether absolute or by way of security, which, under the state law, is not good, against any creditor of the bankrupt, *provided this does not involve a recovery from, or encroachment upon, the right of a bona fide purchaser or holder for value.* This protection to a *bona fide* holder is a limitation imposed by the bankrupt statute, and exists, although not in the state law. In other words, an equitable lien in favor of an innocent holder for value is superior to the title of the trustee, although

under the state law, as in Illinois, it would not prevail against attaching creditors.

The reason for this is emphasized by the facts recited in the referee's report. The receipts taken by petitioners as security for these loans, recite that the property therein described is *in the possession* of the storage company. If this was not the fact, the bankrupt is chargeable with knowledge of it. Petitioners are not. These loans were made, and receipts taken, in the regular course of their business. The referee finds that petitioners acted in good faith. The Circuit Court of Appeals assumes that they are "*bona fide* holders, for value and without notice, of these warehouse receipts, giving therefor a full consideration." (Rec., 392.) When, therefore, Rodgers tendered the receipts and obtained money thereon, he was guilty of a legal fraud upon petitioners, if the Storage Company was not in possession. He obtained, by representing a fact which did not exist, money from petitioners, who, unlike Rodgers, were in ignorance of the truth. This should estop this bankrupt from claiming that these receipts were not what they purported to be. Does an estoppel, binding upon the bankrupt, also bind his trustee in bankruptcy? If not, then trustees and creditors are, by the bankrupt act, permitted to profit by the misconduct or fraud of the bankrupt.

Should such an intention be imputed to Congress? If such was the intention, would not so radical a departure from the previous bankrupt acts have been more clearly expressed?

The following cases hold the trustee in bankruptcy

under the present act is estopped, when the bankrupt is:

In re Standard Laundry Co., 116 Fed., 476; 53 C. C. A., 644.

Pennington v. *Hunt*, 20 Fed., 195.

In *First National Bank* v. *Penn. Trust Co.*, 124 Fed., 968, 60 C. C. A., 100 (heretofore cited under Point V), where there had been a setting aside of iron by way of pledge, accompanied by signs placed thereon indicating the pledge, which, however, had, without the knowledge of the pledgee, been removed by the pledgor before bankruptcy proceedings, the Circuit Court of Appeals decided that the trustee took subject to the lien of the creditor, saying:

"The transaction was one made in the ordinary course of business, without fraud either in fact or in law; it was for a present valuable consideration, and completed more than four months before the adjudication of bankruptcy. * * * It may be that an innocent purchaser for value, or a judgment creditor without notice, might, by execution and levy, have acquired a prior lien; but surely, as against the pledgor, the bank's lien remained, notwithstanding the removal of the signs. Neither the general creditors nor the receiver of the bankrupt could acquire any better title to any property of the bankrupt than the bankrupt himself had at the time of filing the petition in bankruptcy, and therefore the lien was good as against them. The receiver in bankruptcy, standing in the place of the trustee, takes the property in question 'as a purchaser from the bankrupt, with notice of all outstanding rights and equities.' Whatever the bankrupt might do to make the property available to the general creditors, he may do nothing more, except that he may sue for and recover that which was conveyed in fraud of creditors."

It is difficult to distinguish this case, as respects the question under consideration, from the one at bar. In each case the bank made a loan in the regular course of its business, and in doing so relied upon a change of possession, and was not chargeable with any knowledge that it did not exist. In each case, by the state law, an attachment or execution writ would have prevailed over the creditor's lien. Thus, as respects the present question, this case seems on all fours with the one at bar.

There is, however, a pronounced conflict in the views of the lower courts respecting the construction of the above provisions of the bankrupt act, as applied to somewhat kindred questions, arising upon unrecorded chattel mortgages, fraudulent conveyances, etc. It is not the purpose of this brief to review these cases in detail. A number of them are here listed.

In re Economical Printing Co., 110 Fed., 514, 49 C. C. A., 133.

There the Circuit Court of Appeals of the Second Circuit held that a chattel mortgage—which has ceased to be valid as against the mortgagor's creditors or purchasers, because not refiled within a year, as required by the New York statute—is superior to the title of the bankrupt's trustee, although an attachment or execution writ would have been superior to such lien.

The same court announced the same rule in

In re Garcewich, 115 Fed., 87, 53 C. C. A., 510,

as follows (p. 89):

"Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the

bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

In

Hewit v. *Berlin Machine Wks.*, 194 U. S., 296,

this court seems to cite with approval the first of the above cases, and as pertinent, a like decision by Judge Story under a prior bankrupt act.

In re Standard Laundry Co., 116 Fed., 476; 53 C. C. A., 644.

There the Circuit Court of Appeals of the Ninth Circuit held that, when a bankrupt had bought property by bill of sale, *subject* to a chattel mortgage which he assumed to pay, a valid lien was thereby created as against the trustee in bankruptcy, although the mortgage was void as to creditors because not executed in accordance with the California chattel mortgage statute. The court said:

"By the terms of its purchase of the property it is estopped from denying the validity of the mortgage or of its own obligation to Muller. In a case of this character the trustee, representing the creditors, stands in the shoes of the laundry company, and is in privity with it, so far as the title of the property is concerned. He has the same rights that the laundry company has; no more. As the bankrupt is estopped from denying the validity of the mortgage, so is the trustee."

And after reviewing the cases, the court held that the attitude of the trustee in this respect does not differ from that of the assignee under the former act.

In re Chase, 124 Fed., 753; 59 C. C. A., 631.

There the Circuit Court of Appeals of the First Circuit in allowing an assignee, under a voluntary assignment, for the benefit of creditors, priority for his disbursements and compensation incurred and rendered prior to bankruptcy proceedings, held that the trustee in bankruptcy had no equities greater than those of the bankrupt.

In

Chattanooga Bank v. *Rome Iron Co.,* 102 Fed., 755,

a lien upon an equity in property, which had been placed in storage, was, by the District Court of Georgia, held superior to the trustee's title.

In

In re Josephson, 116 Fed., 404,

Judge Speer held that a trustee in bankruptcy took subject to the lien of an unrecorded chattel mortgage.

In re Hinsdale, 111 Fed., 502, and

In re Sewell, 111 Fed., 791,

uphold conditional sales as against the trustee in bankruptcy, although not, under the state law, valid against attaching creditors.

Other cases assert the superiority of the trustee's title to unrecorded chattel mortgages, etc.

Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593, 58 C. C. A., 261 (4th Cir.) (conditional sale).

In re Pekin Plow Co., 112 Fed., 308, 50 C. C. A., 257 (8th Cir.) (unrecorded chattel mortgage).

In re Butterwich, 131 Fed., 371 (conditional sale).

In re Thorp, 130 Fed., 371 (unrecorded mortgage).

Hence petitioners have at least, equitable liens, that are superior to the title of the trustee.

Respectfully submitted in the belief that the order of the Circuit Court of Appeals ought to be reversed, and that of the District Court affirmed.

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